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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 307

DAVID H. BERMAN AND DOROTHY BERMAN, CO-PARTNERS, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF DAVID H. BERMAN COMPANY, PETITIONERS

v.

ERNEST L. LEVINE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The oral opinion of the District Court (R. 83–84) is not reported. The opinions of the Circuit Court of Appeals (R. 136–142) are reported at 161 F. 2d 386.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 6, 1947 (R. 143). A petition for a rehearing, filed on May 21, 1947, was denied on June 2, 1947 (R. 144). The petition for a writ

of certiorari was filed on August 29, 1947. The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether petitioners' circumstances had so changed, between the date of respondent's entry into the armed service and the date of his discharge therefrom, as to make it impossible or unreasonable for petitioners to restore respondent to the position which he had held at the time he entered the service, or to one of like seniority, status, and pay.

STATUTES INVOLVED

Section 8 (b) of the Selective Training and Service Act of 1940, c. 720, 54 Stat. 885 (50 U. S. C. App. 308), provides:

> (b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within forty days after he is relieved from such training and service—
>
> (A) if such position was in the employ of the United States Government, its Territories or possessions, or the District of Columbia, such person shall be restored to

such position or to a position of like seniority, status, and pay;

(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

* * * * *

STATEMENT

Prior to the respondent's induction into the armed forces of the United States in April 1942, he was employed by the petitioners, wholesale rug dealers, to sell several types of rugs, among them one known as the "Tumble Twist," for which petitioners were exclusive sales agents throughout the United States (R. 100–101). He was assigned a particular territory in which to sell these products, comprising, with the exception of certain cities, the States of Illinois, Indiana, Wisconsin, Michigan, the eastern half of Minnesota, and the eastern half of Iowa (R. 100–101). When not on the road, the respondent was to sell in the petitioners' Chicago office (R. 100). His commissions on sales varied from three per cent to ten per cent, and at all times during his employment by petitioners, he was paid a ten per cent commission on the sale of "Tumble Twist" rugs (R. 101, 102). Upon his return from military duty, the respondent promptly applied for reemployment in his

former position (R. 101). At that time, the petitioners were engaged in selling the "Tumble Twist" rug exclusively (R. 101). The petitioners' business had increased greatly over what it was when the respondent left for the armed forces and three salesmen were employed in respondent's former territory (R. 102). While the commission paid to new salesmen had been decreased to seven and one-half per cent, when respondent applied for reemployment, and for some time afterwards, other salesmen were receiving ten per cent commission on "Tumble Twist" rugs (R. 87, 110–112, 140). The petitioners refused to reinstate respondent as salesman with his former territory or at the same rate of commission which he had been receiving on sales of "Tumble Twist" rugs, but instead offered him a different territory with a restricted allotment of merchandise to sell at a reduced commission of seven and a half per cent (R. 102–103). There was evidence showing that the increase in petitioners' business required some changes in the organization, but, as the Circuit Court of Appeals observed, there was no showing that the respondent could not have successfully disposed of any allotment of rugs for his old territory (R. 139).

Respondent refused to accept these offers and brought suit under the provisions of the Selective Training and Service Act of 1940. The District Court concluded as a matter of law that petitoners' circumstances had so changed as to make

it impossible or unreasonable to restore respondent to his former position, or one of like seniority, status, and pay (R. 103). After holding that inasmuch as the record and findings disclosed that petitioners were still selling "Tumble Twist" rugs in the same territory formerly covered by respondent; that the change in the petitioners' circumstances was that they were selling six times as many rugs in 1946 as in 1941, had more orders than the manufacturer could fill, and had to allot the rugs available to its customers in the various territories (R. 139–140); and that it was possible to give the respondent his old territory with whatever allotment of rugs to which the territory was entitled (R. 140), the court below reversed on the ground that the facts did not support the District Court's conclusions of law and remanded the case to that court with directions that it restate its conclusions of law in accordance with the opinion of the Circuit Court of Appeals.

ARGUMENT

Contrary to petitioners' contention, there is not involved in this case any question of whether the Selective Training and Service Act authorizes judicial regulation of "the details of a veteran's reemployment" as such or is "designed to effect a distribution of an employer's profits deemed inordinate" (see Pet. 7). This case presents the rather simple question, mainly factual in nature, of whether the circumstances of peti-

tioners had so changed as to make it impossible or unreasonable to require them to restore the respondent to his former position, or "to a position of like seniority, status, and pay." The court below concluded that petitioners' circumstances had not so changed as to excuse them from complying with the requirements of the Selective Training and Service Act in so far as respondent's reemployment was concerned, and that the position to which petitioners did offer to restore respondent was not one of like seniority, status, and pay. We submit that, in view of the nature of the issue involved, there is no warrant for further review.

1. It is undisputed that petitioners' business had increased and that they were in a position to sell the entire factory output of the "Tumble Twist" rugs for which they had an exclusive sales agency. The sales territory which had been assigned to respondent prior to his entry into the service continued to remain under their exclusive control. At the time respondent applied for reemployment, some of petitioners' salesmen were receiving 10 per cent commission on the sale of the rugs. There is no showing that respondent would have been unable successfully to have performed the function of exclusive salesman for his former territory. On the contrary, it is implicit in the record that owing to the fact that the supply did not equal the demand, salesmanship as such was not required to dispose of the

commodity, and that the main business was to keep contacts and preserve good will as far as possible with the supply of rugs available. Petitioners' circumstances had so changed that they could not furnish all the rugs that could be sold in the territory, but the decision below recognized that fact and left to the discretion of petitioners the number of rugs which should be allotted thereto. It is thus clear from the record that it was possible for petitioners to restore respondent to his former sales territory. There is no showing that this procedure would place any unreasonable burden upon petitioners. It is probably true that respondent, with the allotment of rugs which would be assigned to his former territory, would be able to realize a high income. But, as the court below appropriately remarked, the mere fact that the respondent would realize a return greatly in excess of his pre-war salary did not of itself constitute such changed circumstances as to justify a refusal to restore him to his former position. *Trusteed Funds* v. *Dacey,* 160 F. 2d 413, 420 (C. C. A. 1). And the fact that respondent's former territory has been reassigned to other salesmen likewise is not such a changed circumstance as to make respondent's restoration to his former position unreasonable. *Ibid.*

2. Nor did petitioners comply with the alternate requirement of the Act by offering respondent a position of like seniority, status, and pay.

The position or positions which petitioners offered respondent were not commensurate with the one which he had formerly occupied. The territory was undescribed both as to extent and location; the allotment of rugs was calculated to yield him a certain definite income, but, so far as appears from the offers, such allotment had no particular relationship to the potentialities of the undefined territory and, in any event, was smaller than the allotment for his former territory; and the rate of commission offered was lower than that which he formerly received and which was still being paid to some salesmen. Respondent had worked his former territory prior to going into the service, presumably had built up contacts and good will, and was entitled to obtain the benefits therefrom when he returned from the service, including commissions at his old rate. Petitioners, in offering a less desirable position both as to territory and rate, failed to meet the alternative requirement of the statute. See *Trusteed Funds* v. *Dacey, supra,* at p. 419; *Whitver* v. *Aalfs-Baker Mfg. Co.,* 67 F. Supp. 524 (N. D. Iowa); *Mihelich* v. *Woolworth Co.,* 69 F. Supp. 497 (D. Idaho).

3. This Court has held that the returning veteran must be restored to his former position "or to a position of like seniority, status, and pay," and that he is protected against receiving an inferior job. *Fishgold* v. *Sullivan Corp.,* 328 U. S. 275, 284. To that extent, the law is settled.

The question presented in this case—whether the circumstances of the employer had so changed as to make it impossible or unreasonable to restore the employee to his former position and whether the alternative position offered was a like one—is either factual or, at best, a mixed question of law and fact. Here the court below undertook to apply the undisputed facts to the plain language of the statute. Even assuming, contrary to what we believe to be the plain import of the evidence, that the court below misconceived the facts, we submit that this is not the type of a question which calls for review by this Court.

CONCLUSION

It is respectfully submitted that the petition for writ of certiorari should be denied.

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